

United States Court of Appeals
FOR THE NINTH CIRCUIT

MONTE VISTA LODGE,

Appellant,

vs.

THE GUARDIAN LIFE INSURANCE
COMPANY OF AMERICA,

Appellee.

On Appeal From the United States District Court
For the Southern District of California
Southern Division

PETITION FOR REHEARING

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FILED

UUCI 231967

OCT 18 1957

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21303

MONTE VISTA LODGE,

Appellant,

vs.

THE GUARDIAN LIFE INSURANCE
COMPANY OF AMERICA,

Appellee.

PETITION FOR REHEARING

Appellant, MONTE VISTA LODGE, respectfully petitions this court for a rehearing and urges the court to reconsider the anomalous condition which it has created within the Bankruptcy Act as a result of its reasoning and judgment in this matter. The grounds for this petition are the following.

1. Chapter X and Chapter XII of the Bankruptcy Act are the only two chapters where special consideration is given to so-called "FHA-insured mortgages". (§ 263 of Chapter X and § 517 of Chapter XII.) However, Chapter X and Chapter XII are the only two chapters which contain what is referred to as a "cram-down" provision where, even against the opposition of an entire class of secured creditors, the court may confirm an arrangement affecting such non-consenting creditors.

(§ 216(8) of Chapter X and § 461(11) of Chapter XII.) As a result of the court's decision, in a Chapter X or XII case the court would not permit even a temporary restraint over a foreclosure of an FHA-insured mortgage, despite the cram-down provision in such chapters where not only can secured creditors be restrained but their indebtedness can be modified and altered. However, in a straight bankruptcy proceeding or in a Chapter XI case, where there is no cram-down provision and where secured indebtedness cannot be modified or altered, this court would allow the temporary restraint of a foreclosure of an FHA-insured mortgage.

2. Page 4 of the Opinion of this court's judgment appears to state that the District Court does not even have jurisdiction over the real estate itself, as distinguished from the jurisdiction to restrain the foreclosure. If there were to be an adjudication of this appellant as a bankrupt, or if there were to be a modification of the proceeding so that it fell within Chapter XI rather than Chapter X of the Bankruptcy Act, the District Court would have jurisdiction not only over the property but over the respondent as well. The jurisdiction of the Bankruptcy Court over property asserts itself at the time of the initial filing of a proceeding in the Bankruptcy Court, and is not dependent upon the particular chapter under which such proceeding falls. The Bankruptcy Court must retain jurisdiction over all property involved

in chapter proceedings, so as to maintain the status quo in the event of an adjudication of the debtor as a bankrupt. The Opinion of this court appears to create an inconsistent position with the foregoing.

Respectfully submitted,

RUBIN SELTZER & SOLOMON

By: /s/ JOSEPH J. FISCH

Attorneys for Appellant.

CERTIFICATION OF MERIT

I, JOSEPH J. FISCH, hereby certify that in connection with the preparation of this petition I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing petition is in full compliance with those Rules.

I further certify that in my judgment this petition is well founded and I further certify that this petition is not interposed for the purpose of delay. I have discussed with other counsel the filing of such a petition for rehearing and they are in agreement that there is merit to the position set forth in the accompanying petition.

/s/ JOSEPH J. FISCH

